SUBJECT INDEX

PAGE

Statement of the case 1

Summary of argument 8

Argument 9

I.

Presumptions created by a state statute constitute rules of evidence applicable to cases before this court 9

II.

The provisions of the temporary restraining order are not indefinite or uncertain 14

III.

The judgment is not invalid as a general verdict 17

IV.

There is no denial of due process in joint trials 22

V.

The defendants suffered no prejudice by reason of the length of the trial 26

VI.

The record affirmatively shows that the defendants suffered no denial of due process 28

VII.

Conclusion 30

Appendix A:

California Code of Civil Procedure, Section 527 ..... App. p. 1

TABLE OF AUTHORITIES CITED

CASES.	PAGE
Allen v. United States, 4 F. 2d 688; cert. den. 267 U. S. 597	24
Avery v. State of Alabama, 308 U. S. 444	28
Bell, In re, 19 Cal. 2d 488	21
Braun v. Brown, 14 Cal. 2d 346	10
Cox v. Power (Tyrone) Enterprises, Inc., 49 Cal. App. 2d 383	10
Fay v. New York, 332 U. S. 261	21
General Trading Co. v. State Tax Comm. of Iowa, 322 U. S. 335	10
Ginsberg v. United States, 96 F. 2d 433	23
Gompers v. Buck's Stove & Range Co., 221 U. S. 418	29
Huddleson v. Dwyer, 322 U. S. 232	10
Immel v. Dowd, 6 Cal. App. 2d 145	10
Koteakos v. United States, 328 U. S. 750	22
Milkwagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287	13, 14
Mispah Inv. Co. v. Los Angeles, 215 Cal. 368	10
Missouri Pac. R. Co. v. Humes, 115 U. S. 512	28
Nebbia v. New York, 291 U. S. 502	28
Neblett v. Carpenter, 305 U. S. 297	10
Olmstead v. United States, 19 F. 2d 842; cert. den. 275 U. S. 557	23
People v. Baa, 24 Cal. 2d 374	23
People v. Duran, 57 Cal. App. 2d 363	25
People v. Eudy, 12 Cal. 2d 41	23
People v. Heidt, 20 N. W. 2d 751, 312 Mich. 629	24
People v. Holmes, 118 Cal. 444	25
People v. King, 30 Cal. App. 2d 185	23
People v. Scofield, 203 Cal. 703	18
People v. Wilson, 46 Cal. App. 2d 218	23

PAGE

Powell v. Alabama, 287 U. S. 45 28

Soblowski v. United States, 271 Fed. 294; cert. den. 256 U. S. 697 23

Stromberg v. California, 283 U. S. 359 ..... 17, 18, 19, 20

United States v. Gilbert, 31 Fed. Supp. 195 24

United States v. United Mine Workers, etc., 330 U. S. 258 12

STATUTES

California Code of Civil Procedure, Sec. 527 ..... 11, 12

California Code of Civil Procedure, Sec. 1963 ..... 9, 10, 11

California Code of Civil Procedure, Sec. 1964 11

California Code of Civil Procedure, Sec. 1965 11

California Penal Code, Sec. 166 17

California Penal Code, Sec. 1070 26

California Penal Code, Sec. 1098 ..... 22, 26

United States Code Annotated, Title 28, Sec. 725 10

United States Constitution, First Amendment 1, 2, 20

United States Constitution, Fourteenth Amendment 1, 27

IN THE

Supreme Court of the United States

October Term 1948

No. 111

GUSTANES ANCKER, ROYAL W. ARMSTRONG, FRED M. BARTLETT, *et al.*,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

Brief of Respondents in Opposition to the Granting of Writ of Certiorari.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Statement of the Case.

We are not unmindful of the fact that not only arguments but statements of facts involved in a case before this court should be as brief as possible without sacrificing lucidity to space. The facts in any case must, however, determine the principles of law applicable to such case. In no field of the law is this more true than in the application of the principles concerning the First Amendment as incorporated in the provisions of the Fourteenth Amend-

ment. While the application of such principles may be thought to differ during the decades, or may appear at first glance to differ, we find the underlying principle the same as it was when the respective amendments were added to the Constitution. The First Amendment was designed for protection, and not for aggression; for internal peace and not for discord; for equal rights to all and not for the protection, or as an exception, of particular classes.

By reason of the facts above stated, and also by reason of the fact that failure of the petitioners to incorporate in their petition a brief setting forth at least a résumé of the record, it becomes necessary for the respondents to set forth in considerable detail particulars of the case as shown by the record in order not only to render some assistance to this court in determining the merits of petitioners' contentions, but also to show by the record that the plea of free speech in this case is but a curtain drawn across the trail of law enforcement in an effort to divert attention from their attempt to do, by a show of force, that which could have been accomplished within the outline of peaceful procedure by lawful means, with due consideration and respect for the rights of others, as was the true goal sought by the authors of the First Amendment.

The case at bar arose out of disputes between various unions as to jurisdiction over certain employees and between various unions and motion picture companies. The merits of the disputes were not entered into in the trial court and are immaterial for consideration by this court in passing upon the questions raised by petitioners.

On October 9, 1946, Columbia Pictures Corporation secured a temporary restraining order and order to show cause [certified copy People's Exhibit "L," R. 213]. Paragraphs 1, 2, 4, 5 and 11 of the restraining order formed the basis for the violations charged in Count II, and provided generally, in part, that certain named persons, unions and their agents, attorneys and persons acting in concert with them, were restrained from having more than 25 pickets within 200 feet of Columbia Pictures Corporation's place of business, or more than 8 pickets within 25 feet of the main studio entrance at 1438 North Gower Street, Los Angeles, and that said pickets should be not less than 15 feet apart at pedestrian entrances or 25 feet apart at vehicular entrances, and that there should be no intimidation or coercion of persons desiring to enter said studios, or blocking of said entrances.

The certified copy of the temporary restraining order was admitted in evidence without objection by the defendants as to its validity [R. 213, 223], or the making of any offer of proof to show its invalidity.

The order to show cause was made returnable on October 18, 1946, and on that date the law firm of Pestana and Esterman, by Frank Pestana, appeared for the defendants therein and the hearing was continued to October 25, 1946. On that date Mr. Pestana appeared for defendants therein and the hearing was again continued to November 7, 1946. On November 7, 1946, both Mr. Pestana and Mr. Esterman appeared and the hearing was again continued to November 19, 1946. Before that date the

defendants were to serve and file affidavits in opposition to the granting of a preliminary injunction; the restraining order to remain in force [certified copies of the minute orders for said continuances are People's Exhibit "N," R. 270].

On October 10, 1946, a Deputy Sheriff of Los Angeles County served numerous copies of said temporary restraining order and order to show cause upon members of a large picket line at Columbia Studios, and read said orders over a public address system to the pickets [R. 165; People's Exhibit "G," R. 168, 234; People's Exhibit "H," R. 171; People's Exhibit "I," R. 172, 236]. No arrests were made at that time.

On October 14, 1946, the orders were again read over a public address system [R. 163, 225] to a mass picket line in front of said Columbia Studios [photograph of said picket line is shown in People's Exhibit "F," R. 164]. Three dispersal orders (unlawful assembly) were also read. Again on October 26, 1946, the temporary restraining order and dispersal orders were read to similar mass picket lines [R. 162, 225]. People's Exhibit "E" represents a scene on October 26, 1946 [R. 163, 766, 767]. Numerous arrests were made on both October 14th and October 26th.

On November 15, 1946, between 1500 and 2000 pickets [R. 157, 208] were massed in front of the Columbia Studios, as shown by People's Exhibits "C" [R. 158] and "D" [R. 160]. The temporary restraining order and dispersal orders were again read over a public address system

[R. 157, 221, 222], and many arrests were made [R. 761]. Much newspaper publicity was given to said court order and the arrests for its violation. (Copies of such newspapers are Defendants' Exhibit "1" [R. 713]; People's Exhibit "Q" [R. 314].) As testified to by defendants, the existence of said court order was common knowledge [R. 760-770, 866-869]. Radio publicity was also given said court order and the number of arrests which had been made [R. 857, 863].

On November 16, 1946, the date upon which petitioners were arrested, at about 6:20 A. M., there were six or eight pickets in front of Columbia Studios [R. 145], and at about 6:15 or 6:20 A. M. a large number of pickets, who had congregated across the street from the studios, joined these six or eight pickets [R. 145, 147], and at 6:25 A. M. there were over 200 pickets in front of said studios [R. 148]. As people tried to enter the studios the mass pickets attempted to block their passage and the police had to escort these people through the mass picket line [R. 149]. People's Exhibits "A" [R. 154] and "B" [R. 156] show the picket line as it existed at this time. At about 6:40 A. M. [R. 211] a Los Angeles police officer read the temporary restraining order over a public address system [R. 212, 213, 250], and completed reading it at 6:57 A. M. At 6:58 A. M. said police officer read a dispersal order; at 7 A. M. a second dispersal order, and at 7:02 A. M. a third dispersal order was read [R. 250, 251].

Said public address system is described on page 183 of the Record, and it was testified that the reception was clear and the broadcast could be heard and understood [R. 184].

During the reading of the orders, 70 or 80 pickets left the picket line [R. 152, 154]. People's Exhibit "K" [R. 175, 177, 287] shows the number in the picket line shortly after the last order to disperse was read. Between the time the officer started reading the court order and the last dispersal order, no one joined the picket line [R. 152]. Those who remained, to wit, 125, were arrested. Among those arrested was Frank Pestana [R. 289, 290, 291, 369-375, 931], the aforementioned attorney who had appeared in court on said order to show cause *re* preliminary injunction and who was one of the attorneys in the trial of the case at bar [R. 129, 368, 937]. All of the 125 persons arrested were named in one complaint [R. 1-10]. A number were separated and their cases continued because they were defendants in other "strike cases on trial" [R. 931, 935]. On defendants' motion the remaining defendants were severed for trial into smaller groups [R. 935], petitioners being the 35 defendants whose cases reached the jury in one of these groups.

The complaint was filed November 18, 1946 [R. 929]. Defendants first appeared November 20, 1946 [R. 930]. From that date to February 10, 1947, various motions were made by defendants. On February 10, 1947, the selection of the jury was started [R. 939]. From February 10, 1947 [R. 938], to March 10, 1947 [R. 964], a total of 20 court days were used in selecting the jury. The defense exercised 50 peremptory challenges to the jury before accepting the jury [R. 938-949], for the first time on February 24, 1947. On March 10, 1947, the jury

was finally accepted. The defense exercise a total of 131 challenges, accepting the jury only ten times. During this period the prosecution accepted the jury 88 times [R. 938-964], accepting the jury 18 consecutive times before exercising the first peremptory challenge [R. 944], and used a total of 44 challenges.

On March 11, 1947, three alternate jurors were chosen and the case was recessed (at whose request the record does not show) until March 17, 1947, when evidence was first taken [R. 143, 965], and the prosecution completed its presentation of evidence on March 25, 1947 [R. 657, 689], a total of less than seven court days. The case was then recessed until March 27, 1947 [R. 689] (again the record does not show at whose request), at which time defendants presented evidence [R. 691], finishing before noon on March 31, 1947 [R. 880, 894, 971], or two and one-half days for the presentation of the evidence for the defense, making a total of nine and one-half days for the presentation of evidence for the entire case.

The jury found all defendants, except Emil Freed and James A. Kane, guilty of Count I; all defendants guilty of Count II, and Emil Freed also guilty of Counts III and IV, acquitting all other defendants on Counts III and IV.

The Appellate Department of the Superior Court, County of Los Angeles, State of California, reversed the convictions on Count I as to all defendants. The convictions on Count II were affirmed, except as to Jack Brooks, Sheldon Kelsey and Henry Klette, which convictions were reversed, with direction to the lower court to rearraign said defendants for sentence. The conviction against Emil Freed on Counts III and IV was affirmed [R. 120].

Summary of the Argument.

I.

PRESUMPTIONS CREATED BY A STATE STATUTE CONSTITUTE RULES OF EVIDENCE APPLICABLE TO CASES BEFORE THIS COURT.

II.

THE PROVISIONS OF THE TEMPORARY RESTRAINING ORDER ARE NOT INDEFINITE OR UNCERTAIN.

III.

THE JUDGMENT IS NOT INVALID AS A GENERAL VERDICT.

IV.

THERE IS NO DENIAL OF DUE PROCESS IN JOINT TRIALS.

V.

THE DEFENDANTS SUFFERED NO PREJUDICE BY REASON OF THE LENGTH OF THE TRIAL.

VI.

THE RECORD AFFIRMATIVELY SHOWS THAT THE DEFENDANTS SUFFERED NO DENIAL OF DUE PROCESS.

VII.

CONCLUSION.

ARGUMENT.

I.

Presumptions Created by a State Statute Constitute Rules of Evidence Applicable to Cases Before This Court.

In their Statement as to Jurisdiction (Petition, p. 6, subpar. A), the petitioners appear to rely upon the failure of the People to show that acts were committed or conditions created which justified the Superior Court of the State in issuing the temporary restraining order, the violation of which resulted in the conviction and judgment concerning which the petitioners complain. They correctly point out that the Appellate Department of the Superior Court held that there was a presumption of the existence of a factual condition which justified the issuance of the order in question.

Although the question of whether there was factual basis for the order does not appear to be within the ambit of any of the various "Questions Presented" (Petition, p. 9), it is felt by your respondents that a discussion of this matter is required as a factual basis for discussion of some of the questions presented.

Section 1963 of the California Code of Civil Procedure provides as follows:

> "Disputable Presumptions.—All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:
>
> * * * * * * * *
>
> 16. That a court or judge, acting as such, whether in this state or any other state or county, was acting in the lawful exercise of his jurisdiction."

To orders of a court, the same presumptions, as to regularity of procedure pertaining to judgments or other judicial acts, apply.

Cox v. Power (Tyrone) Enterprises, Inc., 49 Cal. App. 2d 383, 401 (concurring opinion).

Presumptions (created by California Code of Civil Procedure, Section 1963), while disputable, are in themselves evidence.

Mispah Inv. Co. v. Los Angeles, 215 Cal. 368, 372;
Immel v. Dowd, 6 Cal. App. 2d 145, 146.

Such presumptions are in themselves evidence which will support a judgment, unless rebutted,

Braun v. Brown, 14 Cal. 2d 346, 351.

The laws of the various states with respect to evidence are applicable to federal courts except when in conflict with the Constitution, treaties or federal statutes (28 U. S. C. A. 725).

The application of the highest court of a state of its local laws, and the facts on which it founded its judgment, is controlling upon the United States Supreme Court.

General Trading Co. v. State Tax Comm. of Iowa, 322 U. S. 335, 337.

Decisions of the highest court of the state on matters of state law are generally conclusive upon the United States Supreme Court.

Huddleson v. Dwyer, 322 U. S. 232, 236;
Neblett v. Carpenter, 305 U. S. 297, 302.

If the defendants in this case had seen fit, they could have introduced into evidence in the trial court, for the purpose of challenging the validity of the temporary restraining order, the complaint in the Superior Court issuing said restraining order, together with any and all affidavits considered by said court in support of the application for a temporary restraining order.

The granting of temporary restraining orders is governed by Section 527 of the California Code of Civil Procedure. For the convenience of this court said section is printed herein as Appendix A. Attention is directed to the provisions therein which provide that the party obtaining said order must be ready to proceed when the matter first comes on for hearing and that a continuance can only be granted upon the defendant's request therefor.

The presumption that courts act within their jurisdiction created a *prima facie* showing on the part of the People that sufficient facts existed to justify the order of the Superior Court. The burden then shifted to the defendants to overcome such *prima facie* proof. Evidence wilfully suppressed is presumed to be adverse (California Code of Civil Procedure, Sec. 1963-5). In view of the fact that the original complaint and affidavits were on file in the Superior Court and were available to the defendants for the purpose of showing the contents thereof, it must be presumed in this court that if such complaint and affidavits had not supported the order, the defendants would have made them part of the record in the case at bar.

It may be further assumed that, if the defendants felt that the restraining order issued by the Superior Court was improper or too drastic in its provisions, they would not have consented to such order remaining in effect, but would have taken proper action in the Superior Court to have the same modified as provided in Section 527 of the Code of Civil Procedure. The proper method of attack would have been to move the Superior Court for the modifying or vacating of such temporary restraining order, rather than to pass upon the legality of its terms and make no attempt to judicially correct, alter or remove any or all of the restraints placed upon defendants' activities.

In *U. S. v. United Mine Workers etc.*, 330 U. S. 258, 293, this court stated:

> "We find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceeding."
>
> * * * * * * * *
>
> "It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

The above cited case is complete authority for the sustaining of the action of the trial court in the case at bar.

Although there can be no contempt for violation of an order which is void in its inception, such rule does not apply to an order of a court acting within its jurisdiction which is faced with the necessity of evaluating facts and exercising such jurisdiction in a discretionary manner according to the factual situation, which, from the proof, the court finds to exist. In short, there is a presumption that the facts presented to the Superior Court justified the issuance of the temporary restraining order. If, as construed by the petitioners, a portion of such order prohibits acts which are within the field of peaceful picketing, it must be presumed that the facts before the issuing court were sufficient to justify the prohibition until such time as it was shown that there was a change in conditions. (See, *Milkwagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287.) However, we do not admit that the restraining order, in its entirety or the portions set out in the criminal complaint [R. 1, 5], is subject to such construction. The order, like statutes, must be read in its entirety to ascertain its intent. The fact that the court specifically allowed picketing under certain conditions discloses an intent to permit reasonable peaceful picketing within the limits warranted by the facts before said issuing court.

II.

The Provisions of the Temporary Restraining Order Are Not Indefinite or Uncertain.

The petitioners attack the provisions of the temporary restraining order upon various grounds. In point I of our argument we have shown that, within the rule laid down by this court in *Milkwagon Drivers Union v. Meadowmoor Dairies,* 312 U. S. 287, the order was made within the jurdiction of the issuing court. Another ground, at least impliedly urged by petitioners, is that, by its terms the order was so contradictory as to be uncertain, and for that reason invalid. This attack is leveled at paragraphs 5 and 11, set out in the criminal complaint [R. 6].

Briefly stated, paragraph 5, requires that pickets standing, marching or walking before or across entrances to Columbia Studios, leave between adjacent elements certain distances. The word "elements" connotes the possibility that two or more persons may elect to stand or walk together in close formation. However, whether singly or in groups, the order required that between single pickets (not members of a group in close formation) or groups, sufficient space should be provided to enable pedestrians or vehicles to enter or leave the premises without coming in conflict with the pickets.

To a certain extent paragraphs 5 and 11 complement each other. Paragraph 11 allows as many as 25 persons within 200 feet of the place of business of Columbia Studios between Gower Street and Beachwood Drive, provided,

however, that of this number of 25 no more than eight shall be stationed within 25 feet of certain entrances. This paragraph does not state how such eight persons shall stand or march. It is readily apparent that, if allowed to stand relatively close together immediately in front of such entrances or gates, it would be possible for the pickets to form in a position to hinder the free passage of persons or vehicles through the entrances or gates described and shown in People's Exhibit "U" [R. 683].

We must presume that the facts laid before the court issuing the temporary restraining order justified its conclusion that the systematic behavior of the pickets had been such as to induce in the minds of persons wishing to enter or leave through such gates a fear of physical violence if they passed or undertook to pass through a closely formed picket line. The court therefore incorporated in its order, as paragraph 5, a provision which would require that pickets at the gates must leave reasonable room for the entrance or exit of pedestrians and vehicles. It is worthy of note that, under the provisions of the order, after allowing for eight pickets at each gate, that is to say, eight persons within 25 feet of the gates, there remained nine persons who could stand or walk 15 feet or more apart in a semi-circle with its imaginary diameter parallel with and across the gates, with an axis of 25 feet, thereby affording ample opportunity to publicize the fact of, and the facts concerning, such labor difficulty.

Nothing in the provisisions of either paragraph 5 or 11 prohibited persons in anany number in excess of 25 from holding a meeting, as lonong as they kept 200 feet from the premises of Columbia S Studios. That the provisions of the order concerning thehe number of pickets at the gates was understood by those se in charge and control of the conduct of pickets, amply appears by the testimony of defense witness Picket Captain J Kane [R. 761, fol. 1560, to 762, fol. 1562].

Defense witness Jones es testified that the purpose of the picket lines was to keepep scabs out and close the studios down [R. 868, fol. 173535], and that such was his reason for joining the larger r picket line [R. 869, fols. 1735-1737].

The Appellate Departrtment of the Superior Court specifically found that paragagraph 11 of the restraining order was a valid exercise ofof the police power [R. 113, fol. 484], but nowhere in ththe opinion did the court hold that the other provisions of f the order were invalid. The Appellate Court further fofound that the evidence justified the conclusion that each ofof the defendants knew there was an order in existence l limiting the number of pickets to a figure much less thahan the number on the picket line on November 16th [R.]. 116, fols. 488-489]. It is true that such court mentioned ththat some portions of the order were conflicting. However, , we have herein pointed out that the provisions incorporarated in the criminal complaint were not conflicting. Assumming, for the purpose of argument only, that some other p portions of the order were conflicting, it does not follolow that sections which were clear in their meaning were re tainted by such alleged inconsistency.

III.

The Judgment Is Not Invalid as a General Verdict.

The petitioners, after urging the invalidity of certain portions of the temporary restraining order, urge the possibility that the jury might have found them guilty of violation of a void provision, and argue that, because there was a general verdict only, this possibility requires that the judgment be reversed. In support of such contention they depend upon *Stromberg v. California,* 283 U. S. 359.

Petitioners do not, nor can they, urge that Section 166 of the California Penal Code is not a valid statute. They avoid any argument as to the sufficiency of the evidence in that regard. The jury returned a verdict of guilty as to Count II, which required them to find that the defendants did wilfully and unlawfuly disobey a lawfully issued order of a court. The evidence showed that an order of a court had been issued, to-wit, the temporary restraining order; it showed that the provisions in part permitted a limited number of pickets to peacefully inform the public of the nature of their dispute; it showed that a great number of persons, far in excess of the number limited by the Superior Court, were present at the scene of activity, and that the intent of these persons was to wilfully disobey said court order. This was a question of fact and was affirmed on appeal by the Appellate Department of the Superior Court, the court of last resort in such case.

The decision rendered by the Appellate Department of the Superior Court stated, in reference to the provisions of the restraining order:

> "The evidence justifies, indeed requires, that each defendant knew that there was an order in existence

and that among its varied and, in part, conflicting provisions, there were some limiting the number of pickets to a figure much less than the number in operation."

The court did not directly say that the provisions for which these petitioners were convicted are so vague and uncertain that a conviction therefor could not be sustained. The reference to the vague and conflicting provisions could well be to those provisions other than the ones forming the basis of the conviction of the petitioners, due to the length and detail of the restraining order. The court expressly found paragraph 11 of said order to be valid, holding it not necessary to determine the validity of the remaining provisions thereof.

The jury was instructed that, in order to find the defendants guilty upon a complaint (count) charging the doing of two or more acts, the doing of any one of which constitutes an offense, it must agree that the defendants did at least one of such acts [R. 56, fol. 101].

This instruction has been held to be required in such cases.

People v. Scofield, 203 Cal. 703.

The *Stromberg* case, *supra* (*Stromberg v. California,* 283 U. S. 359), was decided upon the construction placed upon the statute by the State court. Such court concluded that the words "organized government," as used in the statute, included opposition to the method whereby a government conducted by one political party in conformance with the method of government approved by the people, or, in other words, opposition by members of, shall we say, the Prohibition party, to the method whereby the

Democratic or Republican Party transacted the business of government even though conducted according to all the forms and requirements of the Constitution. Although we find ourselves unable to see how the State court placed such interpretation upon the statute, we nevertheless concede that this court was required to accept the interpretation placed upon the statute by the California court.

In the case at bar we do not find any interpretation of the order of the Superior Court which would require this court to say that, under the interpretation placed upon the order by the State court, some portion of the temporary restraining order is void.

In the *Stromberg* case it appears from the statement of the court that the prosecution urged to the jury that they could convict if they found the defendant violated the first clause of the statute alone. In the case at bar all the emphasis of the prosecution was placed upon the fact that a crowd of pickets, variously estimated as exceeding 200 in number, converged upon the street in violation of the provisions of the paragraphs of the restraining order limiting the number of pickets (paragraphs 5 and 11 of the restraining order). In the *Stromberg* case, this court, accepting the construction of the statute by the state court and taking into consideration the emphasis of the prosecution upon the first clause of the statute, held that such first clause constituted a limitation upon the right to free expression of opinion in a peaceable manner. The record in such case is utterly devoid of any evidence of violence or threat of violence. The petitioners in the case at bar attempt to urge that they were deprived of the right of free speech.

Freedom of expression of thought upon political, religious and social ideas is the cornerstone of democracy, and our forbears who suffered by reason of attempted suppression of ideas, never intended, by the adoption of the First Amendment, to sacrifice public peace and good order as a burnt offering on the altar of Freedom of Speech. Neither did the people, in adopting the Due Process Clause of the Fourteenth Amendment, intend that it should be a sword in the hands of an organization bent upon flouting the orderly administration of the law. The record in this case, unlike the record in the *Stromberg* case, shows a planned display of force intended not only to intimidate by a show of force, but also to show contempt for our courts, which, in the final analysis, must be the protectors of the rights of free speech and the preservors of peace and good order in organized government.

Although we have no doubts concerning the validity of each paragraph of the temporary restraining order set out in the criminal complaint, but also of the temporary restraining order in its entirety, we feel that, even though this court may differ with us in this respect, the record is such that, admitting the possibility of unanimous agreement upon violation of provisions, there can be no question that the jury must have agreed upon the fact that paragraphs 5 and 11 of the restraining order were violated.

This case again differs from the *Stromberg* case, in that in such case the record supported a conclusion that there was a strong probability that the jury agreed that there

was a violation of the first clause of the statute, and did not agree upon a violation of either of the other two clauses. There is nothing in the decision in that case indicating that, if the record would have impelled a conclusion that the jury must have agreed there was a violation of a valid clause of the statute, the fact that the jury might also have agreed upon a violation of an invalid clause would invalidate the judgment.

In other words, where it appears that the jury convicts of violation of a valid provision of law, the fact also of a finding of guilt of an invalid portion thereof does not render the valid conviction ineffective.

It has been held by the Supreme Court of the State of California that if a complaint sets forth facts which state a public offense under the statute and a conviction is had thereunder, the burden is upon the one convicted to prove that the said conviction was not based upon a valid section of the statute.

In re Bell, 19 Cal. 2d 488.

A verdict on the evidence is all an accused can claim; he is not entitled to a setup that will give him a chance of escape after he is properly proven guilty. Society also has a right to a fair trial.

Fay v. New York, 332 U. S. 261.

It would follow, therefore, that petitioners herein must sustain the burden and prove conclusively that the jury did not convict them for violating the provisions of the restraining order found to be valid by the court of last resort. This, we submit, petitioners have failed to do.

IV.

There Is No Denial of Due Process in Joint Trials.

Petitioners urge that the joint trial which resulted in their conviction was a denial of due process of law. Section 1098 of the California Penal Code provides as follows:

> *"Trial of defendants jointly charged with crime: Joint and separate trials: Challenges.* When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant. If the defendants are tried jointly, the state and the defendants shall be entitled to the number of challenges prescribed by section 1070 of this code, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to five additional challenges which may be exercised separately; the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants."

In the case cited by petitioners, *Kotteakos v. U. S.*, 328 U. S. 750 at 773, this court stated:

> "There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some.

When many conspire, they invite mass trial by their conduct."

The facts of the case at bar, as set forth herein, clearly show that by reason of the number of persons present and the manner of their concerted action, they invited such a joint trial.

Under the decisions of the courts of California, it has been settled that all persons jointly charged with crime may be jointly named in a single complaint and that the matter of a separate trial for each defendant so charged is a matter resting within the sound discretion of the trial court.

People v. Baa, 24 Cal. 2d 374;
People v. King, 30 Cal. App. 2d 185;
People v. Wilson, 46 Cal. App. 2d 218.

The refusal of the trial court to grant a motion for severance is a valid exercise of judicial discretion, and, when it is not shown that such discretion has been abused, it is not reviewable on appeal.

Soblowski v. U. S., 271 Fed. 294, certiorari denied, 256 U. S. 697;
Olmstead v. U. S., 19 F. 2d 842, certiorari denied, 275 U. S. 557;
Ginsberg v. U. S., 96 F. 2d 433.

Where accused are jointly charged with crime, a separate trial is not a matter of right.

People v. Eudy, 12 Cal. 2d 41.

The following are some of the cases wherein joint trials were held to be proper:

(Trial of 75 defendants):

Allen v. U. S., 4 F. 2d 688 (cert. den. 267 U. S. 597-598).

(Trial of 53 defendants):

People v. Heidt, 20 N. W. 2d 751, 312 Mich. 629.

(Trial of 53 defendants):

U. S. v. Gilbert, 31 Fed. Supp. 195.

In the last cited case the court pointed out that the rights of each defendant can be carefully guarded by the trial judge in the charge to the jury, and that there would be no disadvantage to the respective defendants.

In the case at bar, the attorneys for the Union involved in the dispute represented the petitioners at all stages of the proceedings and not one of said petitioners did at any time seek to appoint, substitute or associate any other counsel. It must be presumed that each of said petitioners was at all times satisfied with the services of their attorneys, and contented to be represented by them, except those petitioners who represented themselves during the trial. The record does not anywhere show an abuse or deprivation of the right of any petitioner to consult or advise with counsel, or show that any petitioner who desired to present evidence in his behalf was denied or deprived of such right. Petitioners' contention in this regard would appear now to be a matter of being dissatisfied with the result of the trial and of the advice and services rendered by counsel of their own choosing.

It is also well settled that the fact that a conspiracy is not alleged in a complaint charging the crime, does not preclude proof of its existence.

People v. Holmes, 118 Cal. 444;
People v. Duran, 57 Cal. App. 2d 363.

It was one of the theories of the prosecution to show the concerted action and conspiracy of these petitioners, and on this theory that much of the evidence was presented.

It is fundamental that in a case wherein there is a joint trial, the sole question upon appeal is, were the defendants prejudiced by reason of such joint trial. There is nothing in the record which tends to indicate that prejudice to any defendant occurred.

Bearing in mind that these defendants elected to be defended by a single firm of attorneys, one member of the firm only conducting the trial at any one period of time, it becomes readily apparent that, in order to afford them a separate trial, the total time consumed would have far exceeded the time consumed in this trial and that some of the defendants would have been denied the early trial provided for by our State Constitution. On the other hand, separate trials, assuming that defendants had been willing to secure additional counsel, would have required the services of approximately 35 different divisions of the court.

Certainly there is no showing, when the reasonable interests of the People of the State are weighed in the balance against the rights of the defendants, that there was in this case any abuse of discretion by the trial court.

V.

The Defendants Suffered No Prejudice by Reason of the Length of the Trial.

Petitioners state that "Each of petitioners, instead of facing a trial of one or two days, was obliged to attend court over two months" [R. 19]. In our Statement of Facts we have shown the number of days devoted to selecting the jury and the period of time devoted to presentation of evidence.

The defendants were entitled to 10 peremptory challenges to be exercised jointly, and in addition 5 individual challenges for each separate defendant, or a total of 185 peremptory challenges for 35 defendants. The People were allowed the same number (California Penal Code, Sections 1070 and 1098).

In making the above computation we have excluded six defendants of the original 41 selected for trial, some of whom pleaded guilty and some were excused on account of sickness or other causes, whereby their cases were not submitted to the jury.

Elsewhere we have shown the period of time consumed in selection of the jury and the number of such challenges used by the People and the defendants. Manifestly, by reason of the fact that, if tried separately or in smaller groups the time required for selection of a jury would have been less by reason of a lesser number of challenges allowable. On the other hand, the greater number of challenges allowable were advantageous to the defendants in securing a jury fully satisfactory to them. We think it is a fair inference from the record that the great number of peremptory challenges used by the defendants was in keeping with the plans of the pickets when they said:

"We will fill the jails, we will fill the courts so they can't handle us" [R. 239]. The time used in taking evidence was comparatively short.

We have shown herein that under the rule of practice in California it is permissible to show by evidence the existence of a conspiracy to commit a crime, even though the offense of criminal conspiracy is not charged in the complaint. This case was tried, at least in part, upon the theory that the acts of aggression which led to the arrests were the result of the execution of a planned course of action. It thus readily appears that, even though the defendants had been tried singly or in groups of four or five, the length of time necessary for the introduction of evidence in each case would not have been substantially less than that required for the presentation of evidence against the group in its entirety.

The fact that a considerable length of time was spent in the trial is not the test of due process. The test is whether the defendants in the case were given a fair trial, free from prejudice. The petitioners have failed to sustain the burden of showing prejudice to their rights by reason of the length of such trial. The "due process of law" clause of the Fourteenth Amendment should not be so construed as to interfere with the State in its enactment and local administration of the criminal law, nor to confine it to any mode of proceedings, so long as the law as enforced by the State affords equal protection to all persons within its jurisdiction, similarly situated, and is not violative of the fundamental rights that are essential to protection of life, liberty and property.

The Fourteenth Amendment does not limit power of states to try and deal with crimes committed within their

borders, and was not intended to bring to test of decision of the United States Supreme Court every ruling made in the course of state trial.

Avery v. State of Alabama, 308 U. S. 444, 446.

VI.

The Record Affirmatively Shows That the Defendants Suffered No Denial of Due Process.

If laws enacted by a state fall within the legitimate sphere of legislative power, and are enforced in compliance with the general rules prescribed by our system of jurisprudence to secure private rights, their harshness, injustice or oppressiveness will not invalidate them as contrary to due process of law.

Missouri Pac. R. Co. v. Humes, 115 U. S. 512.

The guarantee of due process demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

Nebbia v. New York, 291 U. S. 502.

Notice and hearing together with a legally competent tribunal having jurisdiction of the case constitute basic elements of the constitutional requirement of due process.

Powell v. Alabama, 287 U. S. 45.

We have hereinbefore demonstrated by our argument that the petitioners were tried for violation of a valid legislative enactment. Their attempted distinguishment between civil and criminal contempt avails them nothing. The elements of contempt are the same. The only difference in consequences is that the statute provides a greater punishment for criminal contempt than is provided for civil contempt, and that the contemnors have the advantage

that they may be tried by a jury in a court presided over by a judge other than the one who issued the restraining order forming the basis for the action.

Likewise we have shown that the restraining order involved in this action was made well within the jurisdiction of the Superior Court. Examination of the record justifies us in reflecting that:

> "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly called the 'judicial power of the United States' would be a mere mockery."
>
> *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 450.

Not only have the petitioners failed to show where in the record they have suffered any prejudice by reason of procedure of trial, but, on the contrary, have presented a record which affirmatively shows that they have had a "fair trial" within the definitions of such term as gleaned from the opinions of this court. This is emphasized by the fact that the verdicts of the jury convicting all on one count, acquitting some and convicting others on other counts, disclosed that the jury was not prejudiced against any defendant by reason of his being tried with other defendants; that the jury weighed and considered the evidence presented as it applied to each defendant for each particular count, and that their verdict was not the result of passion or prejudice. Certainly the record affirmatively shows that the petitioners, and each of them, suffered no denial of "due process" within the meaning of such term as defined in the many decisions of this court, some of which are cited above.

VII.

Conclusion.

The evidence of this case, whether we consider it as a whole or on the testimony of the defense alone, shows that the demonstration out of which this case grew was never conceived or executed for the purpose of acquainting the public with the facts of a labor dispute. It was conceived and executed as a demonstration of the fact that, unless restrained by official action, the members of the dissatisfied unions and their friends could and would, by force, prevent all persons from entering the premises of Columbia Studios.

The time has not come in this nation, and, by the grace of God, may it never come, when force and threats of force can supersede the process of lawful discussion and settlement of grievances.

There appears in this case no reason, either in law or in good conscience, why the petition should be granted.

The People of the State of California respectfully pray that the petition be denied.

Respectfully submitted,

RAY L. CHESEBRO,
DONALD M. REDWINE,
WALTER C. ALLEN,
PHILIP E. GREY and
JOHN L. BLAND,

By JOHN L. BLAND,

Attorneys for Respondent, People of the State of California.

APPENDIX A.

Sec. 527. *Preliminary—Procedure to Obtain.*

An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits, upon which the injunction was granted, must, if not previously served, be served therewith. No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than ten days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, will be entitled, as of course, to one continuance for a reasonable period, if he

desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day upon which such order is made returnable, such hearing shall take precedence of all other matters on the calendar of said day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law.